In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-611, 71-618 and 71-625

OSCAR E. HYDE, JOE BRECK GANTT AND RICHMOND M. FLOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A92) is reported at 448 F. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1971. A petition for rehearing was denied on October 7, 1971. The petitions for writs of certiorari were filed on November 3, 5 and 6, 1971.[1] The

[1] The petition of Hyde was filed on November 3, 1971, that of Gantt on November 5, 1971, and that of Flowers on November 6, 1971.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand and petit juries were legally constituted.

2. Whether the trial court erred in instructing the jury that, if the government's evidence was believed, as a matter of law interstate commerce was affected for purposes of the Hobbs Act, 18 U.S.C. 1951.

3. Whether petitioners were denied due process because of newspaper publicity during the trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioners were convicted on two counts of conspiracy to extort, and on substantive counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioners Hyde and Flowers were sentenced to concurrent prison terms of eight years. Additionally, Hyde was fined $10,000 on each of the two conspiracy counts and Flowers was fined $5,000 on each of the four counts on which he was convicted, a total of $20,000 each. Petitioner Gantt was sentenced to suspended, concurrent prison terms of five years on the two conspiracy counts, and he was sentenced to imprisonment for one year and a day on one substantive count. The court of appeals affirmed in a comprehensive opinion, one judge dissenting (Pet. App. A1–A92).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A1–A7), showed

that from 1963 to 1967 petitioner Flowers, then Attorney General of Alabama, and others conspired to extort payments from various life insurance companies and small loan companies under threat of the use by Flowers of his official position to prevent the companies from doing business in Alabama. The extortion payments were made under seemingly legitimate contracts for credit life insurance or advisory services which were, in fact, and were known by the parties to be, mere sham contracts for channeling payoffs to petitioners.

ARGUMENT

Petitioners raise again three claims which were fully discussed and rejected in the 66-page majority opinion of the court of appeals: the legality of the selection of the grand jury and the petit jury (Pet. App. A8–A26); the sufficiency of the court's instructions on the issue of interstate commerce (Pet. App. A43–A49); and the effect of newspaper publicity during the trial (Pet. App. A60–A66).

1. Petitioners contend that the grand jury which indicted them was illegally constituted because it was selected by a form of "key man" system and because the letter sent to the "key men" contained a sentence which allegedly added qualifications over and above the statutory standards. Citing *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), they claim that these factors resulted in serious underrepresentation of Negroes and women. They also claim that the petit jury was illegally constituted because the jury lists were made up solely from voter registration lists

which resulted in a serious underrepresentation of Negroes. Further, they contend that the trial court denied them a hearing on the composition of the petit jury in violation of the Jury Selection and Service Act of 1968.

The court of appeals rejected these contentions because petitioners, despite the fact that they had access to relevant records, presented no factual evidence to make out even a prima facie case of purposeful, systematic exclusion in the selection of either the grand jury or the petit jury.

Petitioners were indicted on August 2, 1968, prior to the effective date of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The "key man" system used to develop the grand jury list was not shown to be designed systematically to exclude any cognizable group. As the court of appeals pointed out, the "key man" system is not *per se* unconstitutional (Pet. App. A20). The two "last-minute" depositions submitted to the trial court by petitioners merely showed that the clerk of the court and his deputy, respectively, estimated that Negroes comprised 6.1 or 10 per cent of the jurors and women 7.4 or 20 per cent, while the 1960 census figures showed that Negroes comprised 20.8 per cent of the adult population of the district and women 52 per cent. (Pet. App. A9). It was unclear whether these estimates related to figures for the jury box, the venire lists, those appearing in response to jury summonses or actual jurors. The clerk also stated that an effort was made to obtain a cross-section of the population. The court found that

the underrepresentation of Negroes and women could be explained by non-discriminatory factors and that the percentages did not represent mere tokenism or "spectacular" underrepresentation which would have shifted the burden of explanation on the issue of the jury composition to the government (Pet. App. A16–A17).

The letter sent to the jury nominators contained the sentence, "I know you will give this matter your very careful consideration, and select only such men and women as you would want to pass on a case involving your life, liberty, or property." As the court below held, this did not, on its face, impose an unconstitutional condition. See *Carter* v. *Jury Commission,* 396 U.S. 320; *Turner* v. *Fouche,* 396 U.S. 346; *Jackson* v. *Morrow,* 404 F. 2d 903 (C.A. 5); *Hunt* v. *United States,* 400 F. 2d 306, 308–309. Moreover, when read in the context of the whole letter [2] and considering the fact that there was no showing that the "key men" were all men or all upper or middle class whites, the letter was clearly not unfair (Pet. App. A21–A22).[3]

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[2] The text of the letter is reproduced at Pet. App. A10, n. 8.

[3] Petitioner Flowers also raises the contention that the use of the 1963 jury list, augmented by the prior 1959 list, excluded all potential jurors under age 25, since the indictment was returned in 1968. He cites *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1), for the proposition that young adults—in that case between 21 and 34 years of age—constitute a cognizable group (Pet. 21–22). However, there, as here, the court found it unobjectionable that the jury box was filled in 1968 with jurors selected from a jury pool last filled in 1963. See *United States* v. *Bryant,* 291 F. Supp. 542, 544 (D. Maine).

For selection of the petit jury the voter registration lists were used as the sole source of names, in accordance with the plan of the District Court for the Northern District of Alabama adopted pursuant to the Jury Selection and Service Act of 1968 and approved by the Fifth Circuit Judicial Council. Petitioners here claim that the use of such lists resulted in an underrepresentation of Negroes because only 55 per cent of eligible Negroes were registered while 88 per cent of eligible whites were registered. At trial, petitioners had objected to the jury venire composition solely on the basis of the exemptions and excuses established in the jury selection plan (Pet. App. in court of appeals at 157–160). Since the categories of excuses and exemptions were reasonable, petitioners alleged no "facts which, if true, would constitute a substantial failure to comply with the provisions of [28 U.S.C. 1867]" (28 U.S.C. 1867(d)) and therefore, contrary to their claim, petitioners were not entitled to a hearing on the issue.[4] Petitioners' challenge with respect to the use of the voter registration lists was not raised at trial, and therefore under the relevant statute (28 U.S.C. 1867e) cannot be considered. In any event the court of appeals properly found that, even assuming the figures to be correct, the resulting representation of Negroes as 14 per cent of the juror source, rather than the 20 per cent which reflected their proportion of the population, did not reflect unconstitutional discrimination.

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[4] The court of appeals pointed out that it was not clear whether petitioners were, in fact, denied a hearing (Pet. App. A24).

2. Petitioners claim that the trial judge's instructions concerning whether their activities affected interstate commerce deprived them of their right to have the jury pass on this issue. The judge charged that if the jury believed the government's evidence,[5] then

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[5] The judge's charge to the jury included the following language (Pet. App. A47):

"Now, Ladies and Gentlemen of the Jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed, established that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

"I instruct you that if you find from the evidence beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

* * * * *

"Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed.

* * * * *

"As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act."

as a matter of law the conduct affected interstate commerce. The court of appeals found that by stressing the words "if believed" in his instructions, the trial judge clearly indicated the jury's function, and the instructions as a whole met the required standards. See *Nick* v. *United States,* 122 F2d 660 (C.A. 8), certiorari denied, 314 U.S. 687; *Hulahan* v. *United States,* 214 F.2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Green,* 246 F.2d 155 (C.A. 7), certiorari denied, 355 U.S. 871.

Petitioners stress that affecting interstate commerce is an element of the offense under the Hobbs Act, on which petitioners were entitled to have the jury determine the facts. The majority opinion below, however, is not in disagreement, but points out that while the jury is "to determine whether the facts have been proved," the court "should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce" (Pet. App. A43–A44). As noted, the jury's role as the finder of fact on this issue was repeatedly stressed in the charge by the requirement that the jury must find the facts to be as alleged by the government before the requirement of affecting interstate commerce would be met.

3. Petitioners make no complaint regarding pretrial publicity. They argue that they were denied due process because the trial received extensive newspaper coverage locally, the jury was not sequestered

and the trial judge did not take adequate steps to protect the jury's impartiality.[6] The court of appeals, however, found that it was not necessary to reach the issue of the adequacy of the trial judge's steps, because it found that the newspaper publicity was not prejudicial. The newspaper stories and headlines were not editorial comment on the defendants' guilt nor evaluation of the evidence presented, as in *Sheppard* v. *Maxwell,* 384 U.S. 333, and *Silverthorne* v. *United States,* 400 F. 2d 627 (C.A. 9). The articles here were merely summaries and presentations of trial highlights which could not have prejudiced the jury (Pet. App. A63–A65). See *United States* v. *Manning,* 440 F. 2d 1105, 1112 (C.A. 5), petition for certiorari pending, No. 71–5342; *Gordon* v. *United States,* 438 F. 2d 858, 871–874 (C.A. 5), certiorari denied, October 12, 1971, No. 70–5277. See also *Holt* v. *United States,* 218 U.S. 245, 251.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1971.

[6] The trial judge did instruct the jury at the beginning of the trial and at the end of each day that they were not to read news stories or listen to broadcasters about the trial (Pet. App. A60–A61).

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